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Bolivar-Tees, Inc., Screen Creations LTD., Screen Creations de Mexico, Screen Creations de Celaya, Single Employers and Allan Heller and Sheet Metal Workers' International Association Local 36. Cases 17-CA-19569 and 17-CA-19632

April 12, 2007

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

In this compliance proceeding, the judge found, among other things, that all four named corporate Respondents constituted a single employer and were therefore jointly and severally liable for remedying the unfair labor practices found in the underlying case, which involved the unlawful discharge of five employees. For the reasons stated by the judge, we agree that the two American corporations, Bolivar-Tees, Inc. and Screen Creations Ltd., are a single employer, and that Allan Heller is personally liable for the backpay obligation to the five discriminates. For the reasons stated by the judge, as supplemented below, we also agree that the two Mexican corporations, Screen Creations de Mexico and Screen Creations de Celaya, constitute a single employer with the American corporations.¹

The hallmark of a single employer is the absence of an arm's-length relationship among seemingly independent companies. *RBE Electronics of S.D.*, 320 NLRB 80 (1995); *Hydrolines, Inc.*, 305 NLRB 416, 417 (1991). The Board looks at four factors in making a finding on this issue: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. *Central Mack Sales*, 273 NLRB 1268, 1271-1272 (1984). While the Board considers common control of labor relations a significant indication of single-employer status, *Beverly Enterprises*, 341 NLRB 296, 306 (2004), no single aspect is controlling, and all four factors need not be present to find single-employer status. Instead, the ultimate determination turns on the totality of the evidence in a

¹ On September 21, 2005, Administrative Law Judge Albert A. Metz issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

given case. *Dow Chemical Co.*, 326 NLRB 288, 288 (1998).

In analyzing whether the American and Mexican corporations comprise a single employer, we agree with the judge that three of the four relevant criteria are met here: common ownership, interrelation of operations, and common management. Considering the totality of the circumstances, particularly the substantial interrelationship and repeated lack of arm's-length dealings among the companies, we find that single-employer status exists between the American and Mexican companies.

Common Ownership

Respondent Allan Heller owns 100 percent of Bolivar-Tees and 60 percent of Screen Creations, the two American corporations that we find to be single employers.² Heller also has controlling ownership of the two Mexican corporations: 50 percent of Screen Creations de Mexico (with the remaining ownership shared with his two partners) and 65 percent of Screen Creations de Celaya.

Interrelation of Operations

Screen Creations de Mexico was incorporated in 2000 when Heller purchased the assets of another company, Formtex, one of Screen Creations' Mexican garment manufacturing contractors. Between 2000 and 2001, when it ceased operations, Bolivar-Tees sent cut fabric to Screen Creations de Mexico to sew into the finished garments. Starting in 1999 and continuing through 2001, Heller transferred physical custody of Bolivar-Tees' production equipment to Mexico, first to Formtex and, after its formation, to Screen Creations de Mexico.

As part of the process of transferring equipment from Bolivar-Tees to Screen Creations de Mexico, Heller, for reasons that remain unexplained, transferred the title to this equipment to Screen Creations, the American corporation. This was done in January 2001, ostensibly in exchange for \$225,000, although it is conceded that no money was actually exchanged and that no formal documents exist documenting this transfer of title. Screen Creations, in turn, subsequently insured this equipment for \$550,000, twice the purported exchange "price." It is undisputed that Screen Creations de Mexico has never compensated either Bolivar-Tees or Screen Creations for use of this equipment.³

² Heller's father, Nate Heller, owns the remaining 40 percent of Screen Creations.

³ Screen Creations de Mexico ceased operations in 2004. The equipment originally transferred from Bolivar-Tees to Screen Creations de Mexico was first shipped to a warehouse and then transferred to an enterprise named Confecciones Guanajuato. Heller denied any ownership interest in Confecciones Guanajuato, but conceded that he is "trying to make some sales and help them and get some compensation

A similar situation with respect to equipment and production occurred between Screen Creations and Screen Creations de Celaya. Until 2001, Screen Creations engaged in the sales and screen printing of custom orders using the garments manufactured by Bolivar-Tees. Heller was responsible for bringing in business and overseeing sales. Screen Creations ceased doing the screen printing production work in July 2001. Between July and November 2001, Heller transferred Screen Creations' production equipment, which was valued at \$1,875,000, to Screen Creations de Celaya, a new corporation he established in Mexico. Although Screen Creations retained title to the equipment, Screen Creations de Celaya did not compensate Screen Creations for its use. After transferring its equipment, Screen Creations used Screen Creations de Celaya to meet its production requirements. The presence of "non-arm's length transactions at reduced prices or without payment entirely is . . . probative of interrelation of operations." *Lebanite Corp.*, 346 NLRB No. 72, slip op. at 1 fn. 5 (2006); see *Georjan, Inc.*, 281 NLRB 952, 954 (1986) (interrelationship shown where one company purchased trucks to be used by other company, owner negotiated truck leases with self on behalf of his other company and could cancel them at will, and leases were written to ensure one company could absorb tax loss).

Additionally, the evidence shows that once the Mexican corporations were up and running, Screen Creations continued to play an integral role in the overall operations. Heller testified that Screen Creations' sole business now is centered on providing "technical assistance" to Screen Creations de Celaya. Initially this assistance took the form of production and equipment setup using Screen Creations employees. Later it evolved into sales and customer development, which was performed by Heller, the lone remaining employee of Screen Creations. Screen Creations pays for all of Heller's travel and other business expenses incurred on behalf of the Mexican corporations, including sales, administrative and technical support expenses, and the cost of insuring the transferred production equipment. In turn, all profits from Screen Creations de Celaya go to Screen Creations. According to Heller, however, the profits received are not sufficient to cover all expenses incurred by Screen Creations on behalf of the Mexican corporations. Cf. *Em-sing's Supermarket*, 284 NLRB 302 (1987) (interrelation shown where there is identical ownership, identical business purpose, and lack of arm's-length financial interactions, and where financial exigencies of one entity are

met by the other), *enfd.* 872 F.2d 1279 (7th Cir. 1989); *Tabernacle Sand & Gravel Corp.*, 232 NLRB 957, 959 (1977) (interrelationship shown where, inter alia, second company established and operated as an "adjunct" of first, second transported the products of the first, and trucks used by the first owned by second).

Finally, Heller's own testimony substantiates the close interrelationships between the American and the Mexican corporations. He acknowledged that he closed down the production work done by his American corporations and "made the move to Mexico . . . in an attempt to resurrect the business." As he explained it,

The movement to Mexico benefited Screen Creations, Ltd. and the concept that I had of what my business was. They were going to be getting the lower cost of Mexico and be able to sell product at a lower base rate and continue with the margins that existed before, make better margins or whatever determined by the market by the market conditions Instead of having the manufacturing facility, they were contracting with and they would pay the Mexico facility to print their product. . . . So in my thinking of where I was going to make a living and to continue my business, Mexico offered an opportunity to have fixed costs, to know what your costs are, because you don't know what your costs are when you are running a manufacturing facility until after you are finished.

Asked specifically to describe the relationship between Screen Creations and Screen Creations de Celaya, Heller openly admitted that "[t]he relationship is really—I am Screen Creations." See *Georjan, Inc.*, 281 NLRB at 954 (lack of arm's-length dealings demonstrated by owner's "errors in closely identifying the business with himself").

Common Management

We find that common management is present here. Heller served as the principal officer of both the American and the Mexican corporations. He had primary responsibility for "bringing in the business" that kept each of the companies afloat, and testified that he spends at least 30 percent of his time on the ground in Mexico getting business and managing the work of Screen Creations de Celaya, the sole surviving Mexican corporation. He played a central managerial role with respect to the purchase of assets and control over the equipment transferred among the various corporations. And, as controlling owner, he had ultimate authority over the quintessential managerial decisions to shut down both Bolivar-Tees and Screen Creations de Mexico. In short, he exercised "overall control of critical matters at the policy

down the road for some sales." *Confeciones Guanajuato* pays no compensation for use of the equipment.

level.” *Emsing’s Supermarket*, supra, 284 NLRB at 302.⁴

Our finding of single-employer status is not undercut by the lack of specific evidence indicating centralized control of labor relations. By the time the Mexican businesses were fully up and running, the American businesses no longer produced anything and there were no employees, other than Heller, to “centrally control.” Thus, although the Board typically accords centralized control of labor relations substantial importance in the single-employer analysis, we find it inappropriate to do so here. See *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1993) (where some companies have no employees, factor of centralized control of labor relations becomes less important), enfd. 55 F.3d 684 (D.C. Cir. 1995). Moreover, “to accord less weight . . . to other evidence establishing close control through common ownership and management is not only contrary to Board policy, but would also ignore the realities of commercial organization.” *Canton, Carp’s, Inc.*, 125 NLRB 483, 484 (1959); accord *Overton Markets*, 142 NLRB 615, 619 (1963) (single-employer finding premised on substantial evidence of operational integration despite lack of common control of labor relations).

⁴ We acknowledge that Heller did not control the day-to-day operations of the Mexican corporations. The circumstances presented in this case are unusual, however. The typical single employer situation involves coexisting operations located in the same general area. Here, the companies are located in different countries. Given the distances involved, and the stated intent to transfer all production work from the American corporations to the Mexican corporations, it would be putting form over substance to deny a single employer finding solely because Bolivar-Tees (which ultimately had no employees) or Screen Creations (which ended up with Heller as its sole employee) did not exercise control over the day-to-day production operations of the Mexican corporations. See *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902, 907 (9th Cir. 1964) (“Seldom would it be practicable for two companies situated in different parts of the country to be managed at the local level by one man or management group. If there is overall control of critical matters at the policy level, the fact that there are variances in local management decisions will not defeat application of the ‘single employer’ principle.”), cert. denied 379 U.S. 961 (1965).

In finding the American and Mexican corporations to constitute a single employer, we are mindful that, as the Board recently stated, “[a] single-employer analysis is appropriate only where two ongoing businesses are coordinated by a common master.” *Cadillac Asphalt Paving Co.*, 349 NLRB No. 5, slip op. at 3 (2007). In *Cadillac Asphalt*, one business (Paving) went out of existence no later than 15 days after the other one (LLC) commenced operations. Here, by contrast, Screen Creations de Mexico was incorporated in 2000, and Bolivar-Tees did not cease operations until 2001. In addition, although Screen Creations ceased doing production work before Screen Creations de Celaya began operations, Screen Creations continued in existence and furnished “technical assistance” to Screen Creations de Celaya. Thus, *Cadillac Asphalt* is distinguishable.

Conclusion

As we initially observed, no single factor is controlling, and all four factors need not be present to make a single employer finding. This case illustrates the soundness of the principle that single-employer status ultimately depends on all the circumstances of the particular case. *Richmond Convalescent Hospital*, 313 NLRB 1247, 1249 (1994). We conclude that, on the facts present here, single-employer status exists between the American and the Mexican corporations. Thus, we will hold all four business entities jointly and severally liable to remedy the unfair labor practices found in the underlying case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Bolivar-Tees, Inc., Bolivar, Missouri, Screen Creations Ltd., O’Fallon, Missouri, Screen Creations de Mexico, Tarimoro, Guanajuato, Mexico, Screen Creations de Celaya, Ciudad de Celaya, Guanajuato, Mexico, and Allan Heller, their officers, agents, successors, and assigns, shall make whole the individuals named below, by paying them the amounts following their names, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws:

Donna Pitts	\$20,270.29
Angela Carneal Howe	28,774.16
Darla Reaves	38,311.74
Nona Box	6,416.34
Geraldine Housel	2,626.62

TOTAL: \$96,399.15

Dated, Washington, D.C. April 12, 2007

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Naomi Stuart, Esq., for the General Counsel.

Terry L. Potter, Esq., for the Respondent.

SUPPLEMENTAL DECISION¹

The central issue in this compliance proceeding is who is liable for the unfair labor practice findings resulting from the Board's decision in *Bolivar-Tees Inc.* (Bolivar),² 334 NLRB 1145 (2001). The Board found in that decision, inter alia, that Bolivar violated Sections 8(a)(1) and (3) of the Act³ by suspending and discharging employees Donna Pitts, Darla Reaves,⁴ discharging employees Angela Carneal Howe and Nona Box, and constructively discharging employee Geraldine Housel. The Board Order provided in relevant part for a make-whole remedy for these five discriminatees. The Board Order was enforced by the United States Court of Appeals for the District of Columbia on June 23, 2003.

A compliance specification was subsequently served on the Respondents. The Respondents admit the accuracy of the backpay calculations and the amounts of backpay owed to the five named discriminatees as set forth in the compliance specification. The Respondents, however, argue that Bolivar is no longer in business and the other named entities and Allan Heller, individually, are not liable to remedy the Board and Court orders against Bolivar.

The Government alleges that (1) Bolivar's owner, Allan Heller, failed to observe corporate formalities with respect to Bolivar so that the corporate veil should be pierced and Heller held personally liable for Bolivar's debts and liabilities; (2) Screen Creations, Ltd. and Bolivar are a single employer, so that Screen Creations, Ltd. is liable for the debts and liabilities of Bolivar; (3) the Mexican corporations Screen Creations de Mexico and Screen Creations de Celaya are single employers with Bolivar and Screen Creations, Ltd. so they are liable for the debts and liabilities of Bolivar, and (4) Allan Heller failed to observe the corporate formalities with respect to Screen Creations Ltd., Screen Creations de Mexico, and/or Screen Creations de Celaya so that the corporate veil should be pierced and Heller held personally liable for the debts and liabilities of those corporations.

I. BACKGROUND

A. Bolivar

Bolivar, a Missouri corporation, was incorporated on approximately March 26, 1990. Bolivar was engaged in the business of cutting fabric and sewing the fabric into a finished garment, usually a tee shirt, pursuant to specifications supplied by Screen Creations, Ltd. Bolivar's production operations were performed at a rented facility located at 307 South Pike, Bolivar, Missouri.

In about July 2001 Bolivar ceased operation. The State of Missouri administratively dissolved Bolivar on or about October 21, 2004, for failure to file a 2004 annual registration report with the Missouri Secretary of State. Allan Heller has always

been the 100 percent owner of Bolivar and its only corporate officer and only member of its board of directors. Bolivar and Allan Heller contend that Bolivar has permanently ceased operation and does not have any assets with which to comply with the Board's Order. As set forth below, Heller transferred all of Bolivar's assets to other corporate entities.

B. Screen Creations, Ltd.

Screen Creations, Ltd. was a State of Missouri business incorporated on about September 5, 1974. Screen Creations, Ltd. was engaged in the custom screen printing of tee shirts and other garments until approximately April 2003. From approximately 1989 until April 2003, Screen Creations, Ltd. maintained a production facility in a building at 804 Texas Court, O'Fallon, Missouri. That building was rented from the "Heller Partnership," which consisted of Allan Heller and his father Nate Heller.

Nate Heller was the 100-percent owner of Screen Creations, Ltd. at the time of its 1974 incorporation. Allan Heller began working for Screen Creations, Ltd. in 1976 and beginning in the mid-1980's he acquired part ownership in this company. At all relevant times his ownership interest in Screen Creations, Ltd. has been 60 percent. Nate Heller has held the remaining 40-percent ownership interest.

Screen Creations, Ltd. filed annual reports with the Missouri Secretary of State in 1999–2003. Allan Heller is the only officer or director listed on those annual reports, with the exception of the 2002 annual report, which lists Allan Heller as the corporate president and Allan Heller and Nate Heller as the corporate directors. Allan Heller testified that Screen Creations, Ltd. had no corporate officers other than those listed on its annual reports. All five annual reports are signed by Allan Heller on behalf of the corporation and he is listed as the registered agent for the corporation on the 2001–2003 annual reports. Allan Heller acknowledged that during the period covered by the annual reports, he exercised overall managerial control of the operations of Screen Creations, Ltd. Heller testified that his father was semi-retired during this period, but continued to advise him on business matters. The State of Missouri administratively dissolved Screen Creations, Ltd. on or about October 21, 2004, for failure to file a 2004 annual report with the Missouri Secretary of State.

Screen Creations, Ltd. business consisted of receiving orders from its various customers; purchasing the garment fabric; and contracting with an entity, such as Bolivar, to cut and sew the fabric into garments. Screen Creations, Ltd.'s production employees took the sewn garments and screen printed them with a design and then shipped the finished product to its customers.

By April 2003, Screen Creations, Ltd. ceased all production work at its 804 Texas Court facility and became what Allan Heller termed a "service business" engaged in providing sales and technical assistance to Screen Creations de Mexico and Screen Creations de Celaya, two Mexican corporations operating in Mexico, in which Allan Heller had an ownership interest. As discussed in detail below, the majority of Screen Creations, Ltd.'s production equipment was transferred to Heller's business interests in Mexico.

¹ This matter was heard at Overland Park, Kansas, on June 7, 2005.

² The name of the Respondent Bolivar was amended at the hearing to correctly reflect its current legal name, Bolivar-Tees, Inc.

³ The name of the Charging Party Union was amended at the hearing.

⁴ Reaves' name was amended at the hearing to reflect the correct spelling.

In about April 2003, Screen Creations, Ltd. moved from its facility at 804 Texas Court and since that time has conducted its business operations from leased offices located at 11970 Borman Drive, St. Louis, Missouri. Allan Heller testified that he was Screen Creations, Ltd. only remaining employee, although as recently as early 2005 Screen Creations, Ltd. employed another individual named Mark Neil, who provided sales and technical support to the two Mexican corporations. Neil was the former plant manager at Screen Creations, Ltd.'s production facility at 804 Texas Court, O'Fallon, Missouri.

Screen Creations, Ltd. conducted no regular director's meetings. Heller testified that there were no memoranda regarding the corporate decision to cease production operations and to change to a service business, or regarding the decision to move the Screen Creation, Ltd.'s production equipment to Heller's business interests in Mexico.

C. Allan Heller Incorporates Bolivar

In early 1990 Screen Creations, Ltd. used a company named Liber-Tees located in a rented facility located at 307 South Pike, Bolivar, Missouri, as one of several subcontractors to cut and sew garments. In March 1990 Allan Heller purchased the assets of Liber-Tees for \$170,000. These assets consisted of cutting and sewing equipment. Allan Heller incorporated Bolivar on March 26, 1990, with the purpose of having Bolivar continue to operate cutting and sewing operations at the 307 South Pike address. Heller considered it advantageous to Screen Creations, Ltd.'s business to consolidate the cutting and sewing operation rather than continue to contract these functions to multiple subcontractors.

Allan Heller personally borrowed \$170,000 from Screen Creations, Ltd. to purchase Liber-tees assets. He signed a promissory note dated March 26, 1990, in the amount of \$170,000, promising to repay Screen Creations, Ltd., plus interest. Heller then sold the Liber-Tees assets to Bolivar, by taking a promissory note from Bolivar dated March 26, 1990, wherein Bolivar promised to repay Heller \$170,000 plus interest. The terms of both promissory notes provide for an initial payment on December 31, 1990 and for annual payments thereafter; the payment of the entire remaining principal by March 25, 1995; and the payment of 10 percent annual interest on the unpaid balance. No payments were ever made on either note.

Bolivar's books show that the amount of the promissory note to Heller was a "loan from shareholder" which had increased to \$357,438 by 2000. Heller testified that he did not know why the trial balances reflected loans from shareholder, i.e. Heller, in excess of \$170,000 "unless there were other loans over the years that I didn't recollect." There is no evidence that Heller made any loans to Bolivar other than the March 26, 1990 note and the amount of the loan in excess of \$170,000 apparently reflects interest accrued after March 26, 1990.

D. Bolivar's Capitalization

Heller testified that he did not recall the level of capitalization of Bolivar at the time of incorporation. Bolivar's 2000 and 2001 Federal income tax returns establish that the level of capitalization for the corporation was \$1000 and there is no evidence that Bolivar was capitalized at a level higher than \$1000

at any time during its existence. Heller's decision to term the initial \$170,000 contribution of equipment purchased from Liber-Tees as a debt to shareholder (i.e. Heller) rather than corporate equity/capital suggests that Heller restricted the level of Bolivar's capitalization to the minimum from the beginning of the corporation's existence.

E. The U.C.C. Security Interest

On October 24, 1991, approximately 18 months after Bolivar's formation, and approximately 10 months after both Bolivar and Allan Heller were in default on their respective promissory notes, Allan Heller received from his attorney copies of UCC security interests filings date stamped October 15, 1991, that purport to perfect a security interest on behalf of Heller and on behalf of Screen Creations, Ltd. Respondents admit that these security interests expired on October 24, 1996, and were not in effect at any time material herein. Respondent does not contend that any security interest was in effect in 1999–2001 when Bolivar's equipment was transferred to Screen Creations de Mexico or in 2001–2003 when Screen Creations, Ltd. equipment was transferred to Screen Creations de Celaya.

Heller testified that in 1999 he began moving Bolivar's equipment out of the United States and sending it to Screen Creations de Mexico. The reason for the transfer of assets was because of the financial losses that Bolivar continued to sustain after the 1994 enactment of the North American Free Trade Agreement (NAFTA).

F. Operations of Bolivar and Screen Creations, Ltd.

1. Management/ownership

As noted, at all material times, Allan Heller has been the only corporate officer and director and sole owner of Bolivar. Allan Heller was the 60-percent owner of Screen Creations, Ltd. Throughout the time that Bolivar was in existence, Allan Heller was responsible for the overall corporate management of Screen Creations, Ltd. as well as for Bolivar.

2. Common business address

The annual reports filed by Bolivar for the years 1999–2003 list its "principal place of business or corporate headquarters" as 804 Texas Court, O'Fallon, Missouri. Screen Creations, Ltd. maintained its screen printing facility at this same address. Bolivar's Federal tax returns for the years 2000 and 2001 also state that this location is its corporate address. Allan Heller testified that his office was located at 804 Texas Court, O'Fallon, and that he performed general management of Bolivar's corporate business from the Texas Court address, including management of corporate bank accounts, payment of bills, and invoicing or billing Screen Creations, Ltd. for services performed by Bolivar. The bookkeeper who was responsible for Bolivar's books also worked at the Texas Court address. Bolivar used the 804 Texas Court address on its general corporate checking accounts. The day-to-day supervision of Bolivar's production employees employed at the 307 South Pike facility in Bolivar, Missouri, was performed by Plant Manager Irene Justett.

3. Advances of operating funds

All of Bolivar's work was performed for Screen Creations, Ltd. In providing these services Bolivar incurred, inter alia, costs for rental of the 307 South Pike facility; labor costs for its production employees, including payroll taxes; expenses for the purchase, maintenance, and taxes on machinery and equipment; utility costs; and the cost of maintenance/custodial services. Bolivar billed Screen Creations, Ltd. for the work it performed, however, the amounts invoiced did not cover Bolivar's basic costs of doing business. Because Bolivar did not charge a sufficient amount to cover its operating expenses, Screen Creations, Ltd. regularly advanced operating funds to Bolivar and Bolivar's accounts receivable balance was generally a negative number. Allan Heller testified that it was not uncommon for Screen Creations, Ltd. to advance Bolivar money in order to permit Bolivar to continue to operate.

Bolivar's accounts receivable for January 2001 show a negative balance of \$26,034.05. By July 2001 that negative balance had grown to \$93,321.91 and increased to \$109,500 in October 2001, the last month that a monthly accounts receivable summary report was calculated. These negative balances are reflected in Bolivar's 2000 and 2001 Federal tax returns as a "loan from an affiliate", i.e., monetary advances by Screen Creations, Ltd. to Bolivar. The evidence shows that Bolivar was never a profitable business. Heller acknowledged that an increase in the amount that Bolivar billed to Screen Creations, Ltd. would necessarily decrease the profits of Screen Creations, Ltd. Heller testified that Screen Creations, Ltd. was generally profitable.

4. Insurance policy/value of insured assets

Screen Creations, Ltd. and Bolivar were insured under a common insurance policy in 1999-2000 and 2000-2001, the last 2 years of Bolivar's operation. The insurance policies were issued to Screen Creations, Ltd. and list the insured as Screen Creations, Ltd. doing business at two locations: 804 Texas Court, O'Fallon, Missouri, and at 307 South Pike, Bolivar, Missouri. The insurance policies also insure the building at 804 Texas Court, which Heller testified was owned by the Heller Partnership (i.e. Allan Heller and Nate Heller) in the amount of \$1,500,000. The insurance policies cover screen printing equipment owned by Screen Creations, Ltd. located at 804 Texas Court, O'Fallon, Missouri, in the amount of \$1,875,000 and cutting and sewing equipment owned by Bolivar located at 307 South Pike, Bolivar, Missouri, in the amount of \$550,000.

5. Common profit sharing plan/Heller's compensation

The 1997 Annual Consent of Directors for Screen Creations, Ltd., paragraph 3, states that Screen Creations, Ltd.'s profit-sharing plan was revised to include Bolivar's employees. During 1997, Screen Creations, Ltd. contributed \$30,000 to that profit-sharing plan. Heller asserted that Screen Creations, Ltd.'s corporate records for 1998 and subsequent years could not be located. Therefore, records showing any subsequent contributions by Screen Creations, Ltd. to its profit-sharing plan for the benefit of its employees and those of Bolivar were never produced at the hearing.

Heller testified that he did not draw a salary, benefits, or bonuses from Bolivar and that he did not recall receiving any loans from Bolivar. Heller drew a salary from Screen Creations, Ltd., and received health and life insurance benefits, and profit sharing benefits from Screen Creations, Ltd.

G. Bolivar's Assets

According to Bolivar's tax records, it purchased an additional \$501,218 of equipment over and above the initial start-up equipment purchased by Allan Heller from Liber-Tees in 1990. Allan Heller acknowledged that Bolivar's funds were used to purchase this additional half of a million dollars worth of equipment.

In sum, Bolivar subsequently purchased over half of a million dollars worth of operating equipment in addition to the \$170,000 of equipment purchased from Liber-Tees in 1990. The incomplete business records that the Respondents produced show that Bolivar's 2001 corporate tax return reported the transfer of the equipment to Heller's Mexican business interests was a "sale" in the amount of \$225, 000; insurance records show that Bolivar's equipment was insured for \$550,000 at the time that Bolivar ceased operation in 2001; and tax records show that the total historical purchase price of Bolivar's equipment was \$671, 218. Thus when Bolivar ceased business in July 2001, the corporation owned production equipment of substantial value. Heller chose not to have Bolivar's equipment appraised prior to transferring the equipment to his Mexican business enterprises, so the exact fair market value of Bolivar's equipment is not established.

H. Decision to Close/Reported "Sale" of Bolivar's Assets

Heller testified that he decided to close Bolivar in July 2001 and transfer the cutting and sewing operations performed by Bolivar to his Mexican business enterprise named Screen Creations de Mexico because he could not "sustain losses forever." All of Bolivar's equipment was sent to Screen Creations de Mexico located in Tarimoro, Guanajuato, Mexico. Heller acknowledged that he did not have Bolivar's equipment appraised to assess its fair market value at the time of the transfer.

Although the entirety of Bolivar's equipment was transferred to Mexico, Heller considered the legal title or ownership of the entirety of Bolivar's equipment to be transferred to Screen Creations, Ltd. effective January 1, 2001. Heller testified that there was no documentation of the reputed transfer of title of Bolivar's equipment to Screen Creations, Ltd.; no corporate documents that reflected the decision to close Bolivar's business operations; and no documents that set forth the decision to transfer the entirety of Bolivar's assets to any other entity. Although Bolivar's 2001 Federal tax return reflects a sale of its assets for \$225, 000 on January 1, 2001, Heller testified that there was no actual sale and that the \$225, 000 figure was a number that he and his accountant arrived at after "we went through various scenarios and talked about market conditions, book value and other issues." Heller described the "sale" of the entirety of Bolivar's assets as a "paper transaction" and testified that there was no money or other compensation received by Bolivar as a result of the "sale" claimed on Bolivar's 2001 Federal tax return. Heller acknowledged that after the "sale" and

physical transfer of Bolivar's assets as reflected in the company's 2001 Federal tax return, Bolivar had no remaining assets.

Bolivar's 2001 Federal tax return shows that the loan from Allan Heller, described on the tax return as "loan from shareholder," was not written down or in any way affected by the "sale" or transfer of Bolivar's equipment. Thus, the \$357,438 loan from shareholder (i.e. Heller) reflected on Schedule L, line 19, of Bolivar's 2001 Federal income tax return remained unchanged as a result of the physical transfer of the entirety of Bolivar's equipment/assets to Heller's Mexican business interests. However, the 2001 tax return shows that the loan from affiliate (i.e. Screen Creations, Ltd.), was reduced from \$202,741 at the beginning of the 2001 tax year to \$80,168 at the end of the 2001 tax year. Heller testified that the \$225,000 "sale" of Bolivar-Tees, Ltd. equipment was used to write down the loan to affiliate Screen Creations, Ltd., and that the "loan" that was written down was the amounts advanced by Screen Creations, Ltd. to Bolivar in excess of the amount of work invoiced by Bolivar to Screen Creations, Ltd. Heller was unsure why the loan to affiliate was written down only \$122,573 (i.e., $\$202,741 - \$80,168 = \$122,573$), but surmised that the amounts advanced by Screen Creations, Ltd. to Bolivar had increased after the beginning of the 2001 tax year and that the full \$225,000 "sale" amount was deducted from the amounts advanced by Screen Creations, Ltd. If Heller's surmise is accurate, Screen Creations, Ltd. had advanced Bolivar \$305,168 (i.e. $\$225,000 + \$80,168 = \$305,168$) in operating funds by the time Bolivar ceased business in July 2001.

I. Transfer of Bolivar Assets

The Respondents produced a four-page list of Bolivar's equipment transferred to Screen Creations de Mexico. Heller testified that he prepared the list from shipping documents showing the date that the equipment was shipped from Bolivar's facility in Missouri to Screen Creations de Mexico's facility in Mexico (or to Formtex which then transferred Bolivar's equipment to Screen Creations de Mexico). The record establishes that Heller began transferring Bolivar's equipment out of the United States to Mexico on September 7, 1999, almost 2 years before the Bolivar ceased operation in July 2001. These shipments commenced almost a year to the day after the ALJ's Decision in the underlying case which issued on September 24, 1998.

Heller testified that the four-page list of transferred equipment in evidence as General Council Exhibit 13 reflected the equipment covered by the "sale" of \$225,000 of equipment claimed on Bolivar's 2001 Federal tax return. Heller continued to transfer Bolivar's equipment to Screen Creations de Mexico throughout 2000. The 2nd page of the list sets forth Bolivar's equipment that was physically shipped to Screen Creations de Mexico in approximately August 2001, shortly after Bolivar ceased production operations in its Missouri facility. The fourth page of the list sets forth Bolivar's equipment that was physically shipped to Screen Creations de Mexico on or about September 21, 2001; and the third page sets forth equipment physically shipped on October 5, 2001.

Heller testified that although the entirety of Bolivar's equipment was shipped to Screen Creations de Mexico the legal "title" to all of Bolivar's equipment was transferred to Screen Creations, Ltd., on January 1, 2001, and the transfer of title did not take place on the dates in 1999, 2000, and 2001 when the equipment was actually removed from Bolivar's Missouri facility. The only record of the alleged transfer of legal title of Bolivar's equipment to Screen Creations, Ltd. is the January 1, 2001 "sale" date set forth in Bolivar's 2001 Federal income tax form.

Heller testified that Bolivar's 1999 and 2000 books did not reflect the transfer of its assets out of the country to Screen Creations de Mexico. The equipment transferred in 1999 and 2000 remained on Bolivar's books in 1999 and 2000 as an asset of that corporation. Heller could not recall what entity paid the shipping costs involved in the shipment of Bolivar's assets to Mexico. Screen Creations de Mexico used Bolivar's equipment in its cutting and sewing operations but never paid for the use of this equipment.

Screen Creations de Mexico was not incorporated until February 15, 2000. Heller testified that Bolivar's equipment shipped to Mexico in 1999 was actually shipped to Formtex in Mexico. He explained that Formtex was a vendor to Screen Creations, Ltd. Heller denied that he initially had any ownership interest in Formtex, but stated he purchased Formtex's assets in a transaction similar to his purchase of Liber-Tees, and that the assets he purchased from Formtex were used to set up Screen Creations de Mexico. Heller further testified that Formtex did not pay any compensation to Heller or Bolivar for the equipment that was transferred to it prior to the formation and incorporation of Screen Creations de Mexico.

J. Heller's Knowledge of Board Order

Allan Heller admitted that at all material times during Bolivar's existence, he was the individual who controlled Bolivar's business activities including the corporation's participation in the NLRB proceedings involved in this case. Heller further admitted that he was aware of the ALJ's Decision and Recommendation dated September 24, 1998, as well as the August 17, 2001 Board Order against Bolivar. Heller testified, however, that he did not consider these decisions final or legally binding upon Bolivar.

When Heller closed Bolivar's business and transferred its assets to other entities he did not set up a reserve fund for Bolivar's creditors because he did not believe that Bolivar had any creditors at the time. Heller testified that he "didn't think about" how Bolivar would meet its financial obligations to the discriminatees in the event that the Board's Order was enforced. When questioned at hearing if it was his intent to render Bolivar incapable of complying with its financial obligations to the five discriminatees, Heller testified that: "it was my intention to make a living. It was my intention to cut the losses. It was my intention to feed my family. That is what my intention was and that is what my intention continues to be."

Bolivar has never filed for bankruptcy. Heller testified that he did not know why he continued to file annual reports on behalf of Bolivar in 2002 and 2003 after Bolivar ceased operations in mid-2001.

II. SCREEN CREATIONS DE MEXICO

Screen Creations de Mexico was incorporated on February 15, 2000, and was engaged in the business of contract cutting and sewing of garments at its facility located in Tarimoro, Guanajuato, Mexico. At all material times, Allan Heller has been the 50-percent owner of Screen Creations de Mexico and been the President and a member of its corporate board of directors. The remaining 50-percent interest in Screen Creations de Mexico was held by Alejandro Garcia and Jose Chapa. Screen Creations de Mexico was formed after Heller purchased the assets of the Mexican business, Formtex, and transferred all of Bolivar's equipment to Screen Creations de Mexico for use in its business operations. Screen Creations de Mexico closed its business operations in approximately November 2004 but did not declare bankruptcy.

After the cessation of Screen Creations de Mexico's production operations in 2004, all of Bolivar's equipment that had been transferred to Mexico was moved to a warehouse in Mexico in the vicinity of the City of Celaya, Mexico. Heller testified that the equipment had then been moved from the warehouse to a manufacturing facility named Confecciones Guanajuato located in Juventino Rosas, Mexico. Bolivar's former equipment is currently in use at this manufacturing facility. Heller denied that he had an ownership interest in Confecciones Guanajuato. Heller did not obtain an appraisal of the equipment he transferred to Confecciones Guanajuato. Heller denied that he received any compensation from Confecciones Guanajuato for the use of the equipment but testified "I am trying to make some sales and help them and get some compensation down the road for some sales." Heller stated that the future compensation he hoped to receive from Confecciones Guanajuato for use of the equipment was commission on product sales.

Heller testified that in addition to Bolivar's equipment listed on General Cpanel Exhibit. 13, other equipment of Screen Creations de Mexico, including sewing machines, was transferred to Confecciones Guanajuato. Heller did not have this additional equipment appraised; testified that he did not know the historical cost of this equipment or the amount that the equipment was valued on Screen Creations de Mexico's books. He testified that he had not received compensation for the use of that equipment by Confecciones Guanajuato. Further, Heller testified he did not know the total asset value of Screen Creations de Mexico at the time that it ceased operations.

III. TRANSFER OF SCREEN CREATIONS, LTD.'S PRODUCTION OPERATIONS TO SCREEN CREATIONS DE CELAYA

A. Screen Creations, Ltd. Transfer of Assets to Mexico

Allan Heller testified that on or about July 2001 Screen Creations, Ltd. ceased most of its screen printing production activities and that all its screen printing production activities ceased by April 2003. The screen printing production work formerly performed by Screen Creations, Ltd. at the 804 Texas Court, O'Fallon, Missouri facility was moved to a Mexican corporation, Screen Creations de Celaya, at its facility in Ciudad de Celaya, Guanajuato, Mexico.

Screen Creations de Celaya was incorporated on November 14, 2001. Heller acknowledged that Screen Creations de Celaya

was engaged in the same custom screen printing work, using the same production process as Screen Creations, Ltd. Heller began to move the screen printing production operation to Screen Creations de Celaya before Screen Creations de Celaya was incorporated. Heller transferred the entirety of Screen Creations, Ltd.'s screen printing equipment to Screen Creations de Celaya beginning in 2001 with the bulk of that equipment being transferred by November 2001.

Heller did not obtain an appraisal of the equipment and assets physically transferred from Screen Creations, Ltd.'s Missouri facility to Screen Creations de Celaya's facility in Mexico. Screen Creations, Ltd.'s 2000–2001 insurance policy insured its operating equipment at \$1,875,000. Heller testified that 80–90 percent of Screen Creations, Ltd.'s screen printing equipment was shipped to Screen Creations de Celaya's facility in Mexico.

Although the bulk of Screen Creations, Ltd.'s assets were moved out of the United States, there was no change on Screen Creations, Ltd.'s books to reflect the transfer of its operating equipment to another entity. Heller testified that although the equipment was moved to Mexico the legal title of the equipment was not transferred from Screen Creations, Ltd. Screen Creations, Ltd.'s insurance policy was changed to reflect the new location of Screen Creations, Ltd.'s assets and it continued to pay for the insurance on the assets used by Screen Creations de Celaya. Screen Creations de Celaya did not pay compensation to Screen Creations, Ltd. for the use of the screen printing equipment.

Heller asserted that when Screen Creations de Celaya had income, it apparently forwarded that income to Screen Creations, Ltd. Heller, however, did not explain what agreement, if any, existed for such payments or whether any such payments had been made.

The approximately 10–20 percent of Screen Creations, Ltd.'s equipment that was not moved to Mexico was sold during the period July 2001 to April 2003. Heller described these assets as "older equipment" and testified that no appraisal of the value of this equipment was made prior to sale. Heller acknowledged that there were records of these sales; that the sales records had not, however, been produced pursuant to the Government's subpoena; and Heller declined to estimate the amount realized in the sale. Heller asserted that the proceeds from the sales of the equipment went to Screen Creations, Ltd.'s bank accounts.

B. Heller's Ownership/Management of Screen Creations de Celaya

At all material times, Heller has been the 65-percent owner of Screen Creations de Celaya, and has been president of the corporation and a member of its board of directors. At the time of the June 7, 2005 compliance hearing, Screen Creations de Celaya was in operation, and Heller testified that he spent approximately 30 percent of his time in Mexico managing and/or engaged in business on behalf of Screen Creations de Celaya. Heller's involvement in Screen Creations de Celaya's business includes efforts to obtain sales and management of the technical or production aspects of the business. When asked to describe the relationship between Screen Creations, Ltd. and Screen

Creations de Celaya, Heller testified “I am Screen Creations—that is all that is left.”

C. Current Operation of Screen Creations, Ltd.

In April 2003, after the cessation of Screen Creations, Ltd.’s production operations and sale and transfer of its screen printing production equipment, the company moved to rented offices at 11970 Borman Drive, St. Louis. Screen Creations, Ltd. continues to operate as an entity that provides “sales and technical assistance” to Screen Creations de Celaya. Screen Creations, Ltd. does not bill Screen Creations de Celaya for these services it performs on behalf of the Mexican corporation.

Heller’s share of the profit from the operation of Screen Creations de Celaya is deposited into a Screen Creations, Ltd. account. Heller testified that the revenues that Screen Creations, Ltd. receives from Screen Creations de Celaya are not sufficient to cover Screen Creations, Ltd.’s expenses, which include the cost of insurance that Screen Creations, Ltd. maintains to cover its production equipment that is currently in the possession and use of Screen Creations de Celaya; the cost of Heller’s business travel in Mexico on behalf of Screen Creations de Celaya; the cost of Heller’s health insurance; office expenses; and shipping costs.

D. Assets of Screen Creations, Ltd.

Heller testified that Screen Creations, Ltd. retains title to its equipment and assets transferred to Mexico, including cutting and sewing equipment formerly owned and used by Bolivar; and screen printing equipment formerly used by Screen Creations, Ltd. Heller also acknowledged that Screen Creations, Ltd. continues to hold the promissory note for \$170,000 plus interest reflecting the March 26, 1990 loan of \$170,000 of Screen Creations, Ltd.’s funds to Allan Heller. Heller admitted that he never made any payments to Screen Creations, Ltd. on the loan; that he did not know if the loan had been forgiven; and that he had never declared income on his personal income tax form as a result of the loan being forgiven.

Screen Creations, Ltd.’s 2001 Federal tax form shows total corporate income of \$1,450,823. The 2001 Federal tax return shows loans to shareholders in the amount of \$366,929. Although Allan Heller and his father Nate Heller are the only two shareholders of Screen Creations, Ltd., Heller was not able to state whether his father had outstanding loans from Screen Creations, Ltd. or whether the loan to shareholders reflected on Screen Creations, Ltd.’s 2001 tax return was the March 26, 1990 promissory note that Allan Heller signed after Screen Creations, Ltd.’s loan of \$170,000 to him.

The 2001 tax return of Screen Creations, Ltd. shows \$306,071 “due from affiliated companies.” Heller testified that he believed that the \$306,071 reflected amounts due to Screen Creations, Ltd. from Bolivar, notwithstanding Bolivar’s 2001 Federal tax return that states the amount that Bolivar owed to Screen Creations, Ltd. was \$80,168.

Heller testified that in 2004 Screen Creations de Celaya had revenues of approximately \$1,500,000 and that its revenue level increased in 2004 over its revenue level of 2003. Heller testified that Screen Creations, Ltd.; Screen Creations de Celaya; and he personally have not declared bankruptcy.

E. Documentation of Corporate Decisions/Salary

Screen Creations, Ltd.’s annual consent of directors forms for 1990–1997 show the annual salaries paid by Screen Creations, Ltd. to Allan Heller and to his father Nate Heller, as well as contributions to the corporate profit sharing plan. The annual consent forms do not set forth the amount of compensation these individuals received in the form of benefits such as health and life insurance, although other sources suggest that the corporation provided such benefits. The records show that the following salaries were paid:

YEAR	SALARY NATE HELLER	SALARY ALLAN HELLER	PROFIT SHARING PLAN
1990	\$201,250	\$226,250	\$104,653
1991	\$156,800	\$156,800	\$50,000
1992	\$239,850	\$245,850	\$102,720
1993	\$219,000	\$219,000	\$100,000
1994	\$134,000	\$134,000	\$0
1995	\$104,000	\$107,000	\$0
1996	\$136,000	\$224,750	\$0
1997	\$136,000	\$224,750	\$30,000

Heller testified that the annual consent of directors’ forms for the year 1998 and subsequent years were in existence, but that he could not locate them and therefore had not produced the records pursuant to counsel for the General Counsel’s subpoena. Heller stipulated as to the amount of salary that he received in 1998 and subsequent years, but asserted that he did not know the level of salary drawn by Nate Heller. Heller stipulated that he received the following amounts in salary from Screen Creations, Ltd. in the years indicated: (1) 2000: \$187,000; (2) 2001- \$99,750; (3) 2002-\$90,240; and (4) 2003: \$103,600. Respondents offered no evidence regarding the amount of compensation received by Heller and his father from Screen Creations, Ltd. in the years 1998 and 1999.

The Annual Consent of Directors of Screen Creations, Ltd. dated September 1, 1997, paragraph 3 states that Screen Creations, Ltd.’s profit-sharing plan had been revised to include Bolivar’s employees. As noted the Respondent did not produce Screen Creations, Ltd.’s consent of director forms for actions taken after 1997. Thus, the record does not show what, if any, profit sharing monies went to Screen Creations, Ltd. or Bolivar personnel after 1997.

IV. ANALYSIS

A. Bolivar’s Cessation of Business

A Board order is a vindication of public policy and is binding not only on a named respondent but also is binding upon the respondent’s “officers, agents, successors and assigns.” As the Board has stated “It is well settled that the mere discontinuance in business does not necessarily render moot the allegations of unfair labor practices against a respondent.” *Redway Carriers, Inc., Cardinal Leasing, Inc.*, 301 NLRB 1113 (1991). See, *East Dayton Tool & Die Co.*, 239 NLRB 141 fn. 1 (1978); *Armitage Sand & Gravel*, 203 NLRB 162, 166–167 (1973), *enfd. in part* 495 F.2d 759 (6th Cir. 1974), citing *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 107 (1942). Although

Bolivar ceased operations, its “officers, agents, successors and assigns” retain the responsibility to manage the corporate assets so that the corporate assets are available to remedy the corporation’s unfair labor practices.

B. Allan Heller’s Personal Liability for Bolivar’s Unfair Labor Practices

The Parties argue opposite sides of the question as to whether Allan Heller’s actions with regard to disposing of Bolivar’s assets should permit piercing of the corporate veil and holding him personally liable.

It is axiomatic that the corporate form of business organization serves the legal and policy purpose of promoting business investment by protecting corporate shareholders against personal liability. “The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception.” *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402–403 (1960). See *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1576 (10th Cir. 1990), cert. denied, 498 U.S. 849 (1990) (the corporate veil should be pierced only reluctantly and cautiously). In order to ensure the benefits of the corporate legal fiction, however, the law requires the corporation to maintain a distinct and separate identity from its shareholders.

The Board in *A. J. Mechanical Inc.*, 345 NLRB No. 22, slip op. at 2–3 (2005) reiterated its test for determining whether the corporate veil should be pierced. It noted that the proper analytical framework for such a determination is articulated in *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047 (10th Cir. 1993) and set forth by the Board in *White Oak Coal Co.*, 318 NLRB 732 (1995), enforced 81 F. 3d 150 (4th Cir. 1996):

Under Federal common law, the corporate veil may be pierced when: (1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct, and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.

When assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled. Among the specific factors we will consider are: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation’s ownership and control; (5) the availability and use of corporate assets, the absence of [same] or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm’s-length relationship among related entities; (8) diversion of the corporate funds or assets to noncorporate purposes, and, in addition, (9) transfer or disposal of corporate assets without fair consideration.

When assessing the second prong, we must determine whether adhering to the corporate form and not piercing the corporate veil would permit a fraud, promote injustice, or lead to an evasion of legal obligations. The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form. Further, the individuals charged personally with corporate liability must be found to have participated in the fraud, injustice, or inequity that is found. (Footnotes omitted.)

C. Allen Heller’s Personal Liability for Bolivar’s Obligations

Allan Heller made the decision that caused Bolivar’s corporate assets to be removed from its Missouri operations and sent to Mexico for the beneficial use by his Mexican business interests including Screen Creations de Mexico, Formtex, and Confecciones Guanajuato. There are no accurate business records of the transfer including an appraisal of the value of the transferred equipment. That equipment included not only the original \$170,000 worth of assets Heller purchased from Liber-Tees, but additionally, the approximately \$500,000 worth of equipment subsequently purchased by Bolivar. Heller does not claim that he ever had personal title to any of these corporate assets. The removal of the assets was done without Bolivar receiving any financial compensation and thus impoverishing Bolivar of its asset base. The beneficiaries of the transfer were Allan Heller, personally, and Screen Creations de Mexico—not Bolivar. Such action demonstrates that Heller did not operate Bolivar as a separate entity, commingled corporate assets, did not maintain adequate business records of the transaction, used the corporate form of Bolivar as a personal instrumentality, disregarded corporate legal formalities, failed to maintain an arm’s length relationship among corporate entities, diverted corporate assets to noncorporate purposes, and transferred and disposed of Bolivar’s corporate assets without fair consideration. Heller acknowledge that he was fully aware of the underlying litigation in this case and, as the owner of Bolivar, made no provision to set aside assets to cover potential liability resulting from that litigation prior to draining Bolivar of its assets.

Allan Heller was Bolivar’s sole owner, officer, and director and it is clear from the record evidence that he considered Bolivar’s corporate property as his personal property to be disposed of as he saw fit, regardless of the corporation’s legal obligations and the need for meeting corporate formalities. The transfer of Bolivar’s equipment and assets benefited Heller personally as Heller made the entirety of Bolivar’s equipment available for the use of his Mexican business interests including Formtex, Screen Creations de Mexico, and Confecciones Guanajuato.

The Bolivar corporate entity purchased the business’ assets, maintained, insured, and paid taxes on those assets. The equipment that Heller appropriated for use in his other business enterprises constituted the entirety of Bolivar’s corporate assets, and Heller’s appropriation of these assets resulted in the corporation being incapable of providing a monetary remedy pursuant to the Board’s Order. The UCC security interest that was filed in 1991 on Bolivar’s equipment expired by October 1996, several years before the 1999 onset of Heller’s appropriation of corporate assets for use in his Mexican business enterprises.

While the note on the original loan is still outstanding it has long been ignored and the evidence shows that no attempt has ever been made by Heller, as the principal in Screen Creations, Ltd., to collect on the note. The total disregard of the obligations under the two March 26, 1990 promissory notes is additional evidence supporting the piercing of the corporate veil as it is clear that Heller simply did not consider the promissory notes to be binding and that the notes were a device to advance Heller's personal business interests under the guise of corporate shells.

Heller was the sole owner, officer, or director of Bolivar and Heller's control over the company was absolute. Bolivar was formed as a separate corporation but it was effectively an operating arm of Screen Creations, Ltd. Bolivar relied upon Screen Creations, Ltd. for its manufacturing business, operating funds, office services and support, shared insurance policies and profit sharing plans. Bolivar used Screen Creations, Ltd.'s address as its principal business address. Bolivar refused to independently set a price for its product that would have provided it with a reasonable level of profit. Bolivar was undercapitalized with only \$1,000 designated as capital from its inception. Bolivar failed to maintain adequate or correct business records. There is no evidence that Bolivar maintained any minutes or memoranda reflecting its business decisions, including accurate records of its business decisions to close and dispose of its assets; it did not keep accurate books reflecting its assets, but rather its equipment that was transferred out of the country in 1999 and 2000 remained on its books as a corporate asset until 2001; and it did not conduct a third party appraisal of its assets prior to transfer of the assets.

No appraisal was made on the property Heller appropriated but Bolivar's records show that the entity made an additional \$500,000 in purchases of equipment above that covered by the original \$170,000 loan. The Bolivar equipment continues in active service in Heller's Mexican operations without any compensation or accounting to Bolivar. Heller made no pretense of maintaining the corporate form regarding the disposal of the Bolivar assets.

While transferring possession of Bolivar's assets to his Mexican business enterprises, Heller transferred putative legal title of Bolivar's assets to Screen Creations, Ltd. This action was accomplished without documentation of the alleged transfer, lack of proof that such a transfer resulted in the reduction of Bolivar's debt, and in disregard of the value of the assets allegedly transferred. I find that the record does not support the conclusion that Bolivar's assets were legally transferred to Screen Creations, Ltd. in January 1, 2001, as asserted by Allan Heller.

As stated in *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1112 (9th Cir. 1979), and noted in *NLRB v. O'Neill*, 965 F.2d 1522, 1531 (9th Cir. 1992), the treatment of corporate assets as one's own often constitutes the most serious evidence of disregard of the corporate form. I find that the evidence establishes that the first prong of the *White Oak Coal* test, i.e. "failure to maintain distinct corporate and individual identities" is met. I conclude, therefore, that the Government has proven the first part of the *White Oak Coal* test for piercing the corporate veil.

As to the second part of the *White Oak Coal* test the evidence shows that an adherence to the corporate form, and not piercing the corporate veil, would "sanction a fraud, promote injustice, or lead to an evasion of legal obligations." Thus, Heller was fully aware of the Board proceedings, including the recommended decision by the Administrative Law Judge issued in September 1998, and the August 17, 2001 Board Order, when the bulk of Bolivar's equipment was transferred in September 1999 through October 5, 2001. The Government has met its burden of showing that the "fraud, injustice, or inequity" flowed from Heller's misuse of the corporate form through his personal usurpation of Bolivar's assets. Thus, it is not the fact that Bolivar is incapable of paying its debts that matters; it is the fact that Heller made a mockery out of separating his personal business interests (including his other corporations) from Bolivar's corporate form. See *Scarborough v. Perez*, 870 F.2d 1079, 1084 (6th Cir. 1989) (In most cases the mere fact that a corporation is incapable of paying all its debts is insufficient for a finding of injustice.) I find, therefore, that Heller's actions in evading the corporate duties required in conducting Bolivar's business, in preference to treating the corporate assets as his own, dictates that the corporate veil be pierced and that he be held personally liable for Bolivar's debts arising from the Board and Court orders in this matter. Any other decision would result in thwarting public policy by allowing Heller to successfully render Bolivar incapable of meeting its remedial obligations. Such actions would promote injustice and lead to an evasion of legal obligations. *United States v. Oscar Frommel & Bros.*, 50 F.2d 73 (2d Cir. 1931), cert. denied 284 U.S. 647 (1931) ("a corporation cannot by divesting itself of all property leave remediless the holder of a contingent claim"); *F & W Oldsmobile*, 272 NLRB 1150, 1151 fn. 2 (1984), ("the fact that the Board's Order had not yet issued when the distribution took place should not diminish the individuals' obligations to the backpay claimants"); *AAA Fire Sprinkler, Inc.*, 322 NLRB 69 (1996) (personal liability imposed where there was manipulation of three companies to evade compliance, lack of arm's length dealing, undercapitalization of the company, and intermingling of corporate and personal assets); *Reliable Electric Co.*, 330 NLRB 714 (2000) (personalities and assets of company and owner indistinct); *Bufco Corp.*, 323 NLRB 609 (1997), enforced, 899 F.2d 608 (7th Cir. 1990) (Personal liability imposed where there was dissipation of corporate assets for personal gain and an attempt to avoid legal obligations under the Act).

D. Single Employer Status of Bolivar and Screen Creations, Ltd.

Single-employer status is characterized by the absence of an arm's length relationship found among unintegrated companies. The Court in *Al Bryant, Inc.*, 711 F.2d 543, 551 (3d Cir. 1983), cert. denied, 464 U.S. 1039 (1984) summarized the appropriate legal test to assessing single-employer status:

Four criteria have been used by the Board in determining whether separate entities constitute a single employer: interrelation of operations, common management, centralized control of labor relations, and common ownership. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast*

Service of Mobile, Inc., 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L.Ed.2d 789 (1965) (per curiam); see also *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1121–1122 and 1121 fn. 1 (3d Cir. 1982); *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902, 905 fn. 4 (9th Cir. 1964), cert. denied, 379 U.S. 961, 85 S.Ct. 649, 13 L.Ed.2d 556 (1965); *Parklane Hosiery Co.*, 203 NLRB 597, 612 (1973). The Board finds no one factor controlling, although it has stressed the first three factors, particularly centralized control of labor relations, which tend to show “operational integration.” Id.; see also *NLRB v. Jordan Bus Co.*, 380 F.2d 219, 222 (10th Cir. 1967); *Parklane Hosiery Co.*, 203 NLRB at 612. Ultimately, single employer status depends on all the circumstances of the case and is characterized by absence of an “arm’s length relationship found among unintegrated companies.” *Local No. 627 International Union of Operating Engineers v. NLRB*, 518 F.2d 1040, 1045–1046 (D.C. Cir. 1975), aff’d on this issue per curiam sub nom. *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976); see *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 384 (9th Cir.), cert. denied, 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979).

Allan Heller has ownership of 100 percent of Bolivar and 60 percent of Screen Creations, Ltd. He was the governing figure in the supervision and management of both corporations, including exercising overall operational and financial control of both entities. Bolivar was formed using funds loaned to Allan Heller by Screen Creations, Ltd. Heller never repaid this loan. Bolivar performed production work only for Screen Creations, Ltd. In performing this work, Bolivar never earned a reasonable profit. Bolivar depended upon Screen Creations, Ltd. for ongoing advances of operating funds and for providing unpaid “back-office” services, including bookkeeping and payroll services. Bolivar and Screen Creations, Ltd. shared a common profit sharing plan. The assets of Bolivar and Screen Creations, Ltd. were covered by a single insurance policy and the policy refers to Screen Creations, Ltd. as having two business addresses: one at 804 Texas Court, O’Fallon, Missouri (Screen Creations, Ltd.), and one at Bolivar’s plant at 307 South Pike, Bolivar, Missouri. Bolivar used Screen Creations, Ltd.’s 804 Texas Court address in O’Fallon, Missouri, as its business address. Bolivar’s Federal tax returns refer to Screen Creations, Ltd. as an “affiliated company.”

Screen Creations, Ltd. has never filed for bankruptcy and continues in operation as a “service” entity that provides services to Heller’s Mexican business enterprises. Screen Creations, Ltd. has additional book assets, including alleged title to the entirety of Bolivar’s production equipment/assets as well as title to the production equipment of Screen Creations, Ltd. used at its 804 Texas Court facility, which was insured for \$1,875,000 in 2001. In sum, I find that the evidence shows that Screen Creations, Ltd. and Bolivar are a single-employer.

E. Allan Heller’s Personal Liability for Screen Creations, Ltd.

Screen Creations, Ltd. was a legally recognized Missouri corporation prior to October 21, 2004. I find that the evidence shows it was operated as an admittedly “affiliated company”

with Bolivar. Allan Heller treated Screen Creations, Ltd.’s assets in a similar fashion to the way he handled Bolivar’s assets—he shipped them to Mexico for use by his Mexican businesses. This stripping of Screen Creations, Ltd.’s assets was done without compensation or written agreement. Allan Heller ran the Bolivar and Screen Creations, Ltd. as personal fiefdoms when it came to such basic corporate matters as the funds, assets, insurance, office expenses, tax treatments, joint bonus pool, and production business relationships. Although the State of Missouri administratively dissolved Screen Creations, Ltd. on October 21, 2004, Heller continues to operate that business. Screen Creations, Ltd. continues to pay for ongoing expenses incurred in the operation of his Mexican enterprises. Heller’s handling of the equipment transfers and the evidence of the single-employer status of the two American corporations is sufficient for me to conclude that the corporate veil shall be pierced and that Allan Heller be held personally liable for the financial responsibilities of Screen Creations, Ltd., which include Screen Creations, Ltd.’s liability as a single employer with Bolivar to provide a remedy pursuant to the Board’s August 17, 2001 Order. I additionally conclude that the surviving unincorporated entity of Screen Creations, Ltd. is likewise responsible for the liabilities arising from the underlying Board and Court of Appeals orders in this matter, and that piercing the corporate veil is not necessary as regards the unincorporated Screen Creations, Ltd.

F. Mexican Corporations as Single Employers with the American Corporations

Regarding the remaining Parties to this proceeding the evidence shows that Allan Heller owns 50 percent of Screen Creations de Mexico; 65 percent of Screen Creations de Celaya; and, as previously noted, 60 percent of Screen Creations, Ltd.; and 100 percent of Bolivar. Heller is the “presidente” of the Mexican corporations. He exercised overall management authority and control of these corporations. The corporate assets from Bolivar were physically transferred to Screen Creations de Mexico, and corporate assets from Screen Creations, Ltd. were physically transferred to Screen Creations de Celaya without compensation and without alteration of the corporate books to show the transfer of assets.

Heller’s Mexican travel expenses and other business expenses incurred while managing his Mexican business enterprises are paid for by Screen Creations, Ltd. That company also pays for the insurance, sales, and technical support for Heller’s dealings through his Mexican interests. Screen Creations, Ltd. receives no compensation for these services. The common ownership, management, interrelated operations, and lack of arm’s-length dealing between Heller’s various business enterprises, including the transfer of property and providing of services without compensation, establish that Heller’s four business enterprises are a single employer, and therefore are separately liable to remedy the obligations of Bolivar established in the August 17, 2001 Board Order. The consequence of the Heller’s actions in blurring the Bolivar’s separate identity and misusing its assets is the diminished ability of that Company to satisfy its remedial and backpay obligations. I conclude that Allan Heller, personally, and Bolivar, Screen Creations Ltd.,

Screen Creations de Mexico and Screen Creations de Celaya are jointly and severally liable for remedying the Board's order of August 17, 2001, as enforced by the Court of Appeals judgment dated June 23, 2003.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The Respondents, Bolivar-Tees, Inc., Screen Creations Ltd., Screen Creations de Mexico, Screen Creations de Celaya, Single Employers and Allan Heller, an Individual, jointly and severally, shall make the following five employees whole under the Board's order as enforced, by paying the following

amounts, plus interest at the appropriate rate, less any tax withholding required by Federal and State laws, and subject to the accrual of additional amounts and additional interest until payment is effected:

Donna Pitts	-	\$20,270.29
Angela Carneal Howe	-	\$28,774.16
Darla Reaves	-	\$38,311.74
Nona Box	-	\$6,416.34
Geraldine Housel	-	\$2,626.62

Dated September 21, 2005